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APPEALS

1 IN THE DISTRICT COURT OF THE EIGHTEENTH  
2 JUDICIAL DISTRICT OF THE STATE OF MONTANA,  
IN AND FOR THE COUNTY OF GALLATIN

3 GALLATIN COUNTY SCHOOL DISTRICT )  
4 NO. 7, BOZEMAN, MONTANA, )

5 Petitioner, )

6 -vs- )

Case No. 27480

7 BOZEMAN EDUCATION ASSOCIATION, )

8 Respondent. )

9  
10 DECISION AND ORDER

11  
12 Petitioner seeks judicial review of a Final Order of the  
13 Board of Personnel Appeals in its case ULP 43-1979. After con-  
14 sidering the pleadings, reading the briefs and hearing the  
15 oral argument held before this Court on August 29, 1985, the  
16 Court enters this Decision and Order.

17 As a result of charges against Petitioner filed by Respondent,  
18 the Bozeman Education Association, the Board of Personnel Appeals  
19 eventually determined that the school district had violated the  
20 Public Employees Collective Bargaining Act, Section 39-31-405,  
21 MCA, and ordered the school district to take certain remedial  
22 action.

23 The original petition, filed by the school district, requested  
24 this Court to determine Petitioner had not violated Section  
25 39-31-401(5), MCA. No allegation was made that the agency

committed any of the legal or factual errors warranting judicial reversal or modification specified in Montana's Administrative Procedure Act, Section 2-4-704, MCA.

The Amended Petition alleged the school district had completed two of the three remedial actions ordered by the Board of Personnel Appeals and asked this Court to declare the matter moot and to dismiss the unfair labor practice complaint filed with the Board. As the school district, admittedly, has not complied with the third requirement, to hold an open hearing on the termination of Kathryn Kifer, the matter is not moot. Furthermore, this Court has no jurisdiction to dismiss the complaint filed with the administrative agency. A court must review decisions of administrative agencies according to the standards prescribed by the legislature in the Administrative Procedure Act and may reverse or modify an administrative agency's decision only when the agency has violated that act. As with the initial Petition, however, the Amended Petition contains no allegations of violations of the Administrative Procedure Act either as concerns matters of fact or matters of law.

WHEREFORE, IT IS HEREBY ORDERED that the Petition and the Amended Petition both be dismissed.

DATED this 6<sup>th</sup> day of September, 1985.

DISTRICT JUDGE

cc: Counsel of Record

STATE OF MONTANA  
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 43-79:

BOZEMAN EDUCATION ASSOCIATION, )  
Complainant, )  
- vs - )  
GALLATIN COUNTY SCHOOL DISTRICT )  
NO. 7, BOZEMAN, )  
Defendant. )

FINAL ORDER

\*\*\*\*\*

The Findings of Fact, Conclusions of Law and Recommended Order were issued by Hearing Examiner Jack H. Calhoun, on February 4, 1981.

Exceptions to the Findings of Fact, Conclusions of Law and Recommended Order were filed by Donald E. White, Attorney for Defendant, on February 24, 1981.

After reviewing the record and considering the briefs and oral arguments, the Board orders as follows:

1. IT IS ORDERED, that the Exceptions of Defendant to the Findings of Fact, Conclusions of Law and Recommended Order are hereby denied.

2. IT IS ORDERED, that this Board therefore adopts the Findings of Fact, Conclusions of Law and Recommended Order of Hearing Examiner Jack H. Calhoun as the Final Order of this Board.

DATED this 14th day of April, 1981.

BOARD OF PERSONNEL APPEALS

By John Kelly Addy  
John Kelly Addy, Chairman

cc: Donald E. White  
Emilie Loring

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STATE OF MONTANA  
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 43-79:

BOZEMAN EDUCATION ASSOCIATION,	)	
	)	
Complainant,	)	FINDINGS OF FACT
	)	CONCLUSION OF LAW
vs	)	AND RECOMMENDED ORDER
	)	
GALLATIN COUNTY SCHOOL	)	
DISTRICT NO. 7, BOZEMAN,	)	
	)	
Defendant	)	

\* \* \* \* \*

I. INTRODUCTION

This unfair labor practice charge was filed by the Bozeman Education Association against Gallatin County School District No. 7 on October 1, 1979. Complainant alleged in the first count of the charge that Defendant's past practice had been to hold open hearings for non-renewed, non-tenured teachers if the teacher so requested; that Kathryn Kifer was refused an open hearing at which others could testify; that such refusal amounted to a change in policy on the subject--a change made without bargaining with the Association; that such change violates 39-31-401(5) MCA. The second count also alleged a violation of 39-31-401(5) MCA. There Complainant contended Defendant unilaterally changed its policy with respect to second evaluators and for hearings for non-tenured teachers on August 14, 1979. The Board of Personnel Appeals is asked to remedy the alleged violations by issuing an order for a full, open hearing for Ms. Kifer and an order requiring Defendant to rescind its policy relative to evaluations of non-tenured teachers and to bargain with Complainant on the subject. The parties agreed to all facts in this matter by stipulation except those facts concerning the Lynne Merrick hearing and related circumstances. A brief hearing was held on the Merrick factual circumstances on August 25, 1980 in Bozeman. Complainant was

1 represented by Emilie Loring; Defendant by Donald White.

2

3

## II. ISSUES

4 Count one: Whether Defendant made a unilateral change in its  
5 policy on hearings for non-renewed, non-tenured teachers in violation  
6 of its duty to bargain under 39-31-401(5) MCA.

7 Count two: Whether Defendant violated 39-31-401(5) MCA by  
8 refusing to bargain on a change in evaluation procedures policy  
9 and by changing its policy on hearings for non-renewed, non-tenured  
10 teachers.

11

12

## III. FINDINGS OF FACT

13 Based on the evidence on the record, including the sworn  
14 testimony of witnesses and the stipulated facts, I find as follows:

15

### COUNT 1

16 1. Complainant Bozeman Education Association is an unincor-  
17 porated association affiliated with the Montana Education Association,  
18 a non-profit corporation organized under the laws of the State of  
19 Montana, maintaining its offices in Helena, Montana. Both Associa-  
20 tions are labor organizations within the meaning of Section 39-31-103(5)  
21 MCA. Complainant Association is the recognized exclusive bargaining  
22 agent for Defendant's professional employees.

23

24 2. Defendant is a body corporate school district with  
25 principal offices in Bozeman, Montana, and is a political subdivision  
26 of the state of Montana, created and existing under the Constitution  
27 and laws of that state. Defendant operates the elementary and  
28 secondary schools in Bozeman, Montana.

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3. The Personnel Policies of Defendant, in effect for the  
1978-79 year set forth procedures for evaluation of non-tenure  
teachers and included the following provision:

The teacher may, within ten days after receiving the notice  
of non-renewal, make a written request to the Superintendent  
for a hearing with the Board of Trustees to discuss the  
reasons for non-renewal of contract.

1           4. Kathryn P. Kifer was employed by Defendant as a special  
2 education teacher for 1976-77, 1977-78 and 1978-79. She did not  
3 have tenure.

4           5. Ms. Kifer was employed under an individual contract with  
5 Defendant for the 1978-79 academic year which included the following  
6 provision:

7           It is further mutually agreed and understood that this contract  
8 and the rights and the obligations of the parties thereunder  
9 shall be governed by the laws of the State of Montana and by  
10 all the provisions of the Policies, Rules and Regulations  
11 currently adopted by the Board. Said Policies, Rules and  
12 Regulations shall be considered a part of this contract, and  
13 the Teacher signing this contract assents to the provision of  
14 the same.

15           6. Ms. Kifer was notified on or about March 14, 1979 that  
16 she would not receive a notice of reelection until funding for her  
17 position was approved and mill levy had passed. On or about June  
18 5, 1979 she was notified that her position had not been funded and  
19 that her contract would not be renewed. Ms. Kifer made a timely  
20 request for an open hearing. She was terminated because of the  
21 financial conditions of the School District along with six other  
22 similarly situated teachers and was not hired for any other position  
23 for the reason the school administration stated it could find  
24 better qualified teachers.

25           7. Other hearings on non-renewal of non-tenure teachers  
26 have been closed, and held in executive session, but no other  
27 non-tenure teacher has requested an open hearing. (However, see  
28 Finding No. 11, infra.) Defendant informed Ms. Kifer that she  
29 could have a public hearing but could not involve other persons  
30 without their waiver of their right to privacy.

31           8. Defendant refused to permit anyone other than Kifer or  
32 her representative to testify.

          9. State law, Section 20-4-206, MCA does not grant any  
hearing rights whatsoever to non-tenure teachers.

          10. The policy for granting hearings to non-tenured teachers  
was passed by Defendant in 1971 and amended in 1972. It was not

1 the intent of Defendant to provide the same type of hearing for  
2 tenured and non-tenured teachers.

3 11. At some time during spring of 1979 another non-tenured  
4 teacher, Lynne Merrick, received notice from Defendant that her  
5 contract would not be renewed for the following school year because  
6 the federal funds previously received for the program would not be  
7 available. She requested and was granted a hearing under Defendant's  
8 personnel policies. The hearing was open and Ms. Merrick was  
9 represented by a Montana Education Association representative.  
10 Teachers, parents and students testified. The hearing resulted in  
11 the program being continued one year on a trial basis.

12 COUNT 2

13 1. Complainant Bozeman Education Association (BEA) is an  
14 unincorporated association affiliated with the Montana Education  
15 Association, a non-profit corporation organized under the laws of  
16 the State of Montana, maintaining its offices in Helena, Montana.  
17 Both Associations are labor organizations within the meaning of  
18 Section 39-31-103(5) MCA. Complainant Association is the recognized  
19 exclusive bargaining agent for Defendant's professional employees.

20 2. Defendant is a body corporate school district with  
21 principal offices in Bozeman, Montana, and is a political subdivision  
22 of the state of Montana, created and existing under the Constitution  
23 and laws of that state. Defendant operates the elementary and  
24 secondary schools in Bozeman, Montana.

25 3. The Personnel Policies of Defendant contain provisions  
26 for a second evaluator and for hearings for non-renewed, non-tenured  
27 teachers. This provision as well as numerous other school policies  
28 have been unilaterally adopted by Defendant without bargaining  
29 with Complainant and is not contained in the collective bargaining  
30 agreement.

31 4. During the summer of 1979 Defendant proposed to change  
32 its Personnel Policies by removing the provision for a hearing.

1 At the School Board meeting held on or about July 10, 1979, repre-  
2 sentatives of the BEA protested the proposed changes as constituting  
3 unilateral changes in the teachers' working conditions. The BEA  
4 asked to bargain with Defendant about the proposed changes in  
5 Personnel Policies.

6 5. At the School Board meeting on or about August 14, 1979  
7 the Board adopted a change in its Personnel Policies by deleting  
8 the provision for a second evaluator and for a hearing. BEA  
9 President Corne protested the action at the meeting. No bargaining  
10 had taken place with the BEA on this matter.

11 6. State law does not require a second evaluation on request  
12 of a teacher, nor does state law provide for hearings for non-tenure  
13 teachers who have been non-renewed. Montana's Board of Public  
14 Education's Standards for Accreditation of Montana Schools requires  
15 the Board of Trustees to adopt specific policies and procedures  
16 for evaluation of teachers, but does not require any particular  
17 number of evaluations.

18

#### 19 IV. DISCUSSION

20 The fundamental labor law question raised here is whether a  
21 public employer in Montana can unilaterally change its policies on  
22 employer evaluations and hearings for dismissal (non-renewal)  
23 where there is no provision covering either subject in the parties'  
24 collective bargaining agreement. There is no evidence on the  
25 record to indicate that either subject had been negotiated in the  
26 past. On the contrary, the District has unilaterally set policy  
27 in these two areas. That it has done so in the past, however,  
28 does not necessarily require a conclusion that it may forever do  
29 so. The duty to bargain in good faith is set forth in section  
30 39-31-305 MCA. The scope of bargaining is defined in section  
31 39-31-201 MCA to include wages, hours, fringe benefits and other  
32 conditions of employment. The pertinent language from the National



1 Labor Relations Act, section 8(d) states that "... wages, hours,  
2 and other terms and conditions of employment..." are proper subjects  
3 of bargaining. The Montana Supreme Court in State Department of  
4 Highways v. Public Employees Craft Council, 165 Mont. 349, 87 LRRM  
5 2101 (1974) held that private sector precedents are relevant in  
6 interpreting our statute when its language and that of the NLRA  
7 are similar. With respect to scope of bargaining, they are almost  
8 identical.

9       The U.S. Supreme Court has divided bargaining proposals into  
10 three categories. NLRB v. Wooster Division of the Borg-Warner  
11 Corp., 356 U.S. 342, 42 LRRM 2034 (1958). Mandatory subjects are  
12 those which regulate wages, hours and other conditions of the  
13 employment relationship, and, over which both parties must bargain  
14 in good faith. Permissive subjects are those which deal with  
15 matters other than wages, hours, and working conditions, and, over  
16 which neither party is required to bargain. Illegal subjects are  
17 those which would require an unlawful act or an act inconsistent  
18 with the basic public policy of the Act. Most subjects are easily  
19 classified as belonging to one or another of the categories. The  
20 controversies usually arise over questions of whether a given  
21 subject comes under the "other conditions of employment" area.  
22 However, it is clear that evaluation procedures are mandatory  
23 subjects of bargaining under our collective bargaining statute.  
24 See Billings Education Association v. School District No. 2,  
25 Billings, ULP 16-75 (1976) enforced sub nomine Board of Trustees  
26 of Billings School District No. 2 v. State of Montana ex rel Board  
27 of Personnel Appeals and Billings Education Association, Cause  
28 #69152, District Court Thirteenth Judicial District, Yellowstone  
29 County (1977), where the Board of Personnel Appeals held that  
30 "...in refusing to bargain over a staff evaluation procedure, the  
31 School District has failed to bargain in good faith with the  
32 Association and in order to prevent re-occurrence of such action,

1 an appropriate cease and desist order will be fashioned."

2       Once it is established that the matter in question is one on  
3 which the parties are required to bargain in good faith; unilateral  
4 changes cannot be made either in those conditions of employment  
5 wages, hours and fringe benefits to which the contract speaks or  
6 in those same areas even if they are not contained in the contract;  
7 unless, of course, there exists a waiver by the party to whom the  
8 duty to bargain is owed. In the instant case there is no evidence  
9 that such a waiver, either expressed or implied, was obtained by  
10 Defendant prior to making the change in evaluation procedures.  
11 The signing of a collective bargaining agreement does not relieve  
12 the parties of the continuing obligation to negotiate prior to  
13 making changes in mandatory subjects of bargaining. NLRB v.  
14 Jacobs Mfg. Co., 196 F2d 680, 30 LRRM 2098 (1952); NLRB v. Katz,  
15 396 U.S. 736, 50 LRRM 2177 (1962); Conley v. Gibson, 355 U.S. 41,  
16 41 LRRM 2089 (1957); NLRB v. Sands Mfg. Co., 306 U.S. 332, 4 LRRM  
17 530 (1939).

18       The other question raised here is whether the employer could  
19 unilaterally change the hearing procedure for non-tenured teachers  
20 by eliminating the policy which provided the hearing and by insisting  
21 that it never intended to provide an open hearing. The latter  
22 contention defies comprehension in light of the facts surrounding  
23 the Merrick hearing. Defendant did indeed provide her with an  
24 open forum at which she was permitted to have witnesses. To say  
25 that it was not the intent of the policy to allow open hearings  
26 for non-tenured teachers avails the District nothing when it  
27 clearly accommodated exactly the opposite results for Lynn Merrick.  
28 There is no real factual question concerning that item; the District  
29 policy provided a hearing which, at least just prior to the Kifer  
30 case, was allowed to be open, if requested. Nor is there any  
31 question that Defendant unilaterally changed that policy. The  
32 question becomes then one of whether the action violates the

1 obligation to bargain in good faith (even during the existence of  
2 a collective bargaining agreement) with the exclusive representative  
3 prior to making changes in working conditions.

4 In *Montana Public Employees Association, Inc., v. Georgia*  
5 *Ruth Rice, Office of Superintendent of Public Instruction, ULP 31*  
6 *and 37-79*, the Board of Personnel Appeals upheld the hearing  
7 examiner's decision which concluded that the public employer was  
8 required to negotiate the subject of termination for cause with  
9 the union. That decision of the Board must control here. The  
10 policy of the Act is not promoted if an employer is allowed to set  
11 or change unilaterally such an important condition of employment  
12 as the manner by which employer decisions regarding discharge (for  
13 any reason - economic or otherwise) may be reviewed. The School  
14 District's policy and practice of allowing non-tenured teachers to  
15 have an open hearing with it is no different than many grievance  
16 procedures found in numerous collective bargaining agreements.  
17 Professor Morris in The Developing Labor Law, 1971 ed. at page 404  
18 states that "Numerous topics fall within 'other terms and conditions  
19 of employment'... Many are now so clearly recognized to be mandatory  
20 subjects for bargaining that no discussion is required. Among  
21 these topics are provisions for a grievance procedure and arbitration,  
22 layoffs, discharge..." The fact that state law does not require a  
23 hearing for a non-tenured teacher does not proscribe it as a  
24 mandatory subject over which Defendant must bargain.

25 Defendant suggests that the enumerated powers of the District  
26 as set forth in section 20-3-324 MCA gives it all the authority it  
27 needs to do what was done in this case. It should be noted,  
28 however, that the collective bargaining act limited the power of  
29 public employers to act unilaterally in certain areas, i.e. wage,  
30 hours, fringe benefits and other conditions of employment. With  
31 respect to that part of section 39-31-303 MCA which identifies the  
32 public employer's prerogative to operate and manage its affairs in,

1 inter alia, the areas of relieving employees from duty because of  
2 the lack of funds, it should suffice to point out that section  
3 39-31-305(2) MCA specifically states that neither party is required  
4 to agree to a proposal or to make a concession. But, to hold that  
5 an employer is not required to bargain over a review procedure for  
6 employee terminations would be tantamount to rendering meaningless  
7 one of the most important employee rights under the act.

8 In summary, Defendant's unilateral action in changing the  
9 hearing policy for non-tenured teachers and in eliminating the  
10 second evaluation of teachers violates its duty to bargain in good  
11 faith with Complainant.

12

13 V. CONCLUSION OF LAW

14 Defendant violated section 39-31-401(5) MCA by making unilateral  
15 changes in the working conditions of Complainant.

16

17 VI. RECOMMENDED ORDER

18 IT IS ORDERED that Gallatin County School District No. 7, its  
19 officers, agents and representatives shall:

20 1. Bargain with the Bozeman Education Association before it  
21 makes changes in conditions of employment affecting the bargaining  
22 unit or its members.

23 2. Hold an open hearing for Kathryn P. Kifer at which she  
24 be allowed to have full opportunity to call witnesses and have  
25 representatives speak on her behalf.

26 3. Rescind its changed policy on the evaluation procedure.

27


28 VII. NOTICE

29 Exceptions to these Findings of Fact, Conclusion of Law and  
30 Recommended Order may be filed within twenty days of service  
31 thereof. If no exceptions are filed, the Recommended Order shall  
32 become the Final Order of the Board of Personnel Appeals. Exceptions

1 shall be addressed to the Board of Personnel Apeeals, Capitol  
2 Station, Helena, MT 59601.

3 Dated this 4th day of <sup>FEB.</sup> ~~January~~, 1981.

6 BOARD OF PERSONNEL APPEALS

7   
8 JACK H. CALHOUN  
9 Hearing Examiner

10 CERTIFICATE OF MAILING

11 The undersigned does certify that a true and correct copy of  
12 this document was mailed to the following on the 4th day of  
13 February, 1981:

15 Donald E. White  
16 Gallatin County Attorney  
17 Law & Justice Center  
18 615 South 16th  
19 Bozeman, MT 59715

19 Emilie Loring  
20 HILLEY & LORING, P.C.  
21 1713 Tenth Avenue South  
22 Great Falls, MT 59405

21 